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No. 85-1953

In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPELLANT'S REPLY TO MOTION TO AFFIRM OR DISMISS

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APPELLANT'S REPLY TO MOTION TO AFFIRM OR DISMISS

Appellant Kansas City Power & Light Company[1] hereby opposes the Motion to Affirm or Dismiss filed by Appellee The State Corporation Commission of the State of Kansas.

1. Appellant's statement pursuant to Supreme Court Rule 28.1 is set forth in its Jurisdictional Statement.

A. Both Appellee and the Court Below Expressly Relied on State Law, As Well As the Federal Legislation and Regulations, to Authorize Promulgation of the Orders Being Challenged Here.

Appellee erroneously contends that no state-federal regulatory "Scheme" exists as the constitutional infirmities alleged by Appellant are directed solely at the federal legislation and regulations. Motion to Affirm or Dismiss at 7. In making this argument, Appellee simply ignores Appellant's discussion regarding the invalidity of the two Kansas statutes. Jurisdictional Statement at i-ii, 2-4 & n.5, 8, 11-12, 14-24. Furthermore, Appellee's own motion notes that the subject October 15, 1984 Order (App. A75-A78) implements two Kansas statutes, in addition to the federal legislation and regulations:

> In *Kansas City Power and Light v. The State Corporation Commission of the State of Kansas,* 238 Kan. 842, 715 P.2d 19 (1986), the Kansas Supreme Court noted that the subject KCC order implements Sections 202 and 210 of PURPA, 16 U.S.C. §824a-3, 824i (Supp. II 1978), amended by 16 U.S.C. §§824a-3, 824i (Supp. IV 1980), FERC regulations implementing PURPA (18 C.F.R. §§292.101-.602 [1985]), *Kan. Stat. Ann. §66-1,184 (1979), and Kan. Stat. Ann. §66-1,185 (1979).* (238 Kan. 842 at 842-43).

Motion to Affirm or Dismiss at 8 (emphasis added). Appellee's Order dated November 2, 1984 confirms this reliance on state law when it makes reference to "the Commission's October 15, 1984 Order and . . . the Kansas and federal statutes and regulations upon which the Order is based." (App. A79-A80). In view of the repeated reliance on both state and federal law in the promulgation and repromulgation of the subject Orders (*see* App. A22, A37, A53, A80), the existence of a state-federal regulatory

Scheme is clear. The Orders under consideration here implement both state and federal law, and the constitutionality of both is here challenged by Appellant.

B. This Appeal Presents Substantial Federal Questions Which Have Not Been Submitted to or Ruled Upon by This Court.

Appellee would have this Court believe that all questions presented in this appeal were resolved in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983), and *FERC v. Mississippi*, 456 U.S. 742 (1982).[2] This simply is not the case. In neither of these cases was the effect of the Taking Clause either raised in the briefs or discussed in the Opinion of the Court. Accordingly, neither case settles the question whether the statutory and regulatory Scheme here at issue violates Appellant's rights under the Taking Clause. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Likewise, no argument regarding freedom of contract was raised in either of these cases. These questions have neither been submitted to nor decided by this Court.[3]

C. The Rational Basis Test Advocated by Appellee Has No Application to a Taking Clause Challenge.

Appellee's Motion erroneously suggests that a taking without just compensation or for private use is constitu-

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2. This contention was rejected in the opinion below. *Kansas City Power & Light Co. v. State Corp. Comm'n*, 238 Kan. 842, 844, 715 P.2d 19, 22 (1986) (App. A4-A5).

3. This Court recently noted probable jurisdiction of an appeal raising one of the Taking Clause issues presented in this case. *FCC v. Florida Power Corp.*, 106 S. Ct. 2273 (1986) (order noting probable jurisdiction). See discussion in Jurisdictional Statement at i-ii, 20-21.

tionally permissible so long as the taking has a real and substantial relation to the legislative objective sought. Of course, there is no precedent supporting this remarkable proposition; the rational basis test which Appellee cites has no application in a Taking Clause analysis.[4] In determining whether a law violates the Taking Clause, the question whether it serves a legitimate public purpose is not dispositive, or even relevant: "It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982). Thus, "a permanent physical occupation authorized by government is a taking *without regard to the public interests it may serve.*" *Id.* at 426 (emphasis added). Because the statutes and regulations under consideration here authorize the taking of Appellant's property[5] for private use and without providing just compensation, they violate the Taking Clause and should be struck down.

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4. Appellee makes the astounding argument that, while Appellant has challenged the results of the rational basis test, it has not challenged the application of such test to the alleged Taking Clause violation. Motion to Affirm or Dismiss at 11. This argument completely misstates the facts.

Consistently throughout this litigation Appellant has, relying upon *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), argued that once a taking is authorized for a private party or without just compensation, the Scheme authorizing such a taking is constitutionally invalid under the Taking Clause "without regard to any supposed public interest to be served." App. A151; Jurisdictional Statement at 17-21.

5. The Scheme authorizes four distinct takings of Appellant's property, of which three are permanent physical occupations. First, it requires Appellant to allow private parties to enter physically upon Appellant's real property to use its power line easements or realty. Second, it requires Appellant to allow private parties to make physical connection with Appellant's poles, wires, and electrical facilities. Third, it requires Appellant to allow private parties to make physical intrusions of electrical power into Appellant's transmission and distribution system. Finally, the Scheme requires Appellant to pay money to private persons while receiving nothing of value in return. *See* Jurisdictional Statement at 16-21.

CONCLUSION

This Court should note probable jurisdiction and set this case for plenary review.

Respectfully submitted,

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